



**Issue Date: 26 July 2005**

Case No.: 2005-LHC-541

In The Matter of:

Guy Mulholland,  
Claimant

v.

Electric Boat,  
Employer

**DECISION AND ORDER  
AWARDING BENEFITS<sup>1</sup>**

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq.* (hereinafter "the Act"). A hearing was held before me in New London, CT on May 2, 2005, at which time the parties were given the opportunity to offer testimony and documentary evidence, and to make oral argument. At the hearing, Claimant's Exhibits 1 - 23, Employer's Exhibits 2 - 14, and ALJ Exhibits 1 - 5 were admitted into evidence. At the close of the hearing, I allowed the parties two weeks to submit additional evidence, specifically the errata sheet to the Dillingham deposition. In an Order Establishing Briefing Schedule dated June 1, 2005, I gave the parties 30 (thirty) days to submit post-hearing briefs addressing the issues raised by Claimant. Employer filed its post-hearing brief on June 30, 2005; Claimant filed his post-hearing brief on June 27, 2005. I have reviewed and considered these briefs in making my determination in this matter.

**I. Statement of the Case**

**Hearing Testimony**

**Testimony of the Claimant**

The Claimant, Guy Mulholland, was born on February 7, 1954 and resides in Wakefield, Rhode Island. (Tr. 26) He graduated from high school in 1972 and has no

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<sup>1</sup> Citations to the record of this proceeding will be abbreviated as follows: "Tr." refers to the Hearing Transcript; "ALJ" refers to the Administrative Law Judge's Exhibits; "CX" refers to Claimant's Exhibits; and "EX" refers to Employer's Exhibits.

post-high school education. (Tr. 26) He has worked as a welder, outside machinist, and security guard. (Tr. 74-75) He was first hired as a welder for Jayfro Corporation in Waterford, Connecticut. (Tr. 26-27) He left Jayfro in 1973 and went to work for Electric Boat ("Employer"), first as a welder then eventually as a carpenter. (Tr. 26-27)

His early carpentry duties included installing sound dampening templates in submarines. (Tr. 28) This position involved some heavy lifting: the templates weighed approximately 15 pounds apiece (Tr. 29), and he had to lift oak blocks weighing 150 to 200 pounds. His tool bag weighed 20 pounds on average and included grinding wheels, a hammer, punches, rulers, etc. (Tr. 30) The job also involved climbing: to gain access to the submarine, he had to use a ladder and climb scaffolding. (Tr. 30)

After eight years of this work, Claimant passed out a few times and was diagnosed with epilepsy. (Tr. 31) The medication he was given prevented him from performing his normal job. (Tr. 31) Employer transferred Claimant to a tool crib where he made materials for the crew, (Tr. 31) maintained a sign-out list for tools, and performed inventory. (Tr. 76) After two years, his epilepsy appeared to be under good control, and he started working as a carpenter again, making full-scale submarine models, which involved drafting and reading blueprints. (Tr. 32, 76) This job also required that he lift objects weighing up to a few hundred pounds. (Tr. 33-34) He stayed with the model shop until it closed during his last year at Electric Boat. (Tr. 33) At that time, he started mixing rubber that was used to coat the outside of submarines. (Tr. 34) He considered himself to be an excellent employee, well-liked by his supervisors. (Tr. 78)

Claimant started experiencing more health problems during the summer of 2000, in the form of numbness and tingling in both hands. (Tr. 34-35) This condition continued at the time of the hearing. Claimant testified that it becomes so bad with cold weather that he has to stop working outside for one to two hours to allow his hands to warm. (Tr. 36) In a warm environment, his condition is aggravated only when he performs repetitive activities, such as typing on a computer. (Tr. 37) In order to relieve the tingling and numbness, he has to stop whatever activity is causing the aggravation. (Tr. 37) Claimant reported he even has trouble holding a pen for a while and that he has dropped cigarettes and wrenches as a result of the numbness. (Tr. 37-38) He has seen Dr. Masterson, who sent him to have an "ice test" and a nerve conduction study, eventually diagnosing white finger. (Tr. 38) Claimant has been awarded four percent impairment on each of his hands. (Tr. 78)

Claimant's back was injured on July 26, 2000. He had been called to clear off the surface of a submarine that was going to leave the dry dock, and was removing an odd shaped ten foot long mold around the sail of the boat. (Tr. 35, 41) The Claimant told his boss it would probably be best to have an additional person help, his boss told him that there was not enough time to get more help. (Tr. 41) While he was lifting the mold, the Claimant suffered a sharp pain that ran up his left leg and lower back. (Tr. 41) He went to the yard hospital and later sought treatment from David Siciliano, a chiropractor in Wesley who had treated him for neck problems in 1995. (Tr. 41-42) Dr. Siciliano provided electronic stimulation, heating pads and manipulation. (Tr. 42-43)

The Claimant's back continued to worsen, and in December 2000 he went to the emergency room at Wesley Hospital during Electric Boat's holiday break. (Tr. 44) Claimant was unable to return to work in January 2001, and he has not returned since. (Tr. 44) Dr. Siciliano referred Claimant to Dr. Pugsley, a neurosurgeon, who has treated Claimant continually. (Tr. 44) Dr. Pugsley ordered MRIs and x-rays, and performed back surgery in August 2001. (Tr. 45) The surgery seemed to help Claimant's pain problems for the first few weeks, but the pain returned and continues to worsen. (Tr. 45-46) Dr. Pugsley referred Claimant to a physiatrist, and he underwent physical and water therapy for approximately four months with no success. (Tr. 46) In fact, Claimant testified that he was unable to walk the day after he had therapy. (Tr. 46) Dr. Pugsley ordered an additional MRI which revealed Claimant had another disc bulge in his next vertebra, resulting from scar tissue that formed after his previous surgery. (Tr. 46-47)

Dr. Pugsley subsequently referred Claimant to a pain clinic at Lawrence and Memorial Hospital, where he continues to receive his medication. (Tr. 47) The pain clinic attempted a series of nine or twelve epidural injections, which did not help, then prescribed a TENS unit about one year before the hearing. (Tr. 48) Claimant uses the TENS unit three or four times a day for approximately two hours each time. (Tr. 47-48) This unit sends electric impulses to the Duragesic patches he wears on his lower back, stimulating endorphins to help block pain. (Tr. 49) It is not to be used while Claimant is driving, in case it malfunctions, sending a jolt through the patches. (Tr. 49)

Claimant also had a spinal cord stimulator implanted in his back. (Tr. 49-50) A battery pack, transmitter and wiring were left externally to operate the stimulator, but if Claimant had success with this treatment, they also would have been implanted in his back. (Tr. 50) This treatment, too, proved unsuccessful. (Tr. 51) Claimant experienced such pain that he went to the emergency room in New London, Connecticut on the first night to see about having it removed, which was ultimately done seven to ten days later. (Tr. 51)

Since the spinal cord stimulator, Claimant has been treated with the TENS unit and medication. (Tr. 52) Currently he is taking Percocet, Skelaxin, Amitriptyline, Neurontin, Ibuprofen, and the Duragesic patch. (Tr. 52) He used to take Ultram, but when that stopped being effective, he switched to Percocet. (Tr. 53) In total, he takes between 20 and 25 pills a day. (Tr. 53) He takes two Percocet every three to four hours.<sup>2</sup> (Tr. 53)

Claimant has difficulty sleeping due to his discomfort. (Tr. 53) He wakes up between four and six times a night and sleeps apart from his wife due to this and her tossing and turning. (Tr. 54) It takes about 20 minutes to 2 hours for him to fall back asleep. (Tr. 54) Due to this difficulty, he naps often during the day. (Tr. 54)

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<sup>2</sup> Indeed, during Claimant's testimony, he needed to take a break so that he could take Skelaxin and Neurontin for muscle relaxation, and Percocet for pain. (Tr. 39)

Claimant typically becomes sore if he has been sitting for a long stretch or standing in the same spot for 20 minutes. (Tr. 55-56) Any lifting, bending, or even five minutes of vacuuming increases the pain. (Tr. 56) He described the pain as sharp. (Tr. 56) To relieve the discomfort, he walks around for 15 to 20 minutes, takes an extra painkiller, or lies down if he is at home to take the pressure off his spine. (Tr. 55-56) On the day of the hearing, Claimant reported being sore after the 35 – 40 minute drive to the courthouse; he arrived 40 minutes early so that he could walk around the parking lot for pain relief. (Tr. 55)

Starting May 17, 2004, Claimant obtained a position working approximately 20 hours a week at Ocean House Marina in Charlestown, Rhode Island, which is 1.5 miles from Claimant's house. (Tr. 57 and 65) The Claimant was offered this position when the owner discovered he repaired old small motors. (Tr. 65-66) The marina paid him \$10.00 an hour to repair a 5-year backlog of small boat motors. (Tr. 57, 61) The Claimant was able to sit or stand at will. (Tr. 90) Using wrenches, screwdrivers and sockets (Tr. 88), Claimant replaced parts in small motors, and tuned up the motors. (Tr. 58, 87) The owner of the marina allowed Claimant to ask the other employees for help lifting the motors that weighed between 30 and 90 pounds, and were outside his weight restrictions. (Tr. 58-60)

Of the six mechanics at the marina, all but Claimant were full time employees and worked on newer larger motors. (Tr. 56-58) Even though Claimant was told he was a good worker, and that the marina was glad to have him as an employee, (Tr. 89) when he had worked through the back log, he was laid off, as the only other positions involved heavy lifting. (Tr. 61 and 89) If Claimant had not been laid off, he would have continued working after September 2004. (Tr. 90) He has been to the marina since then and there has been no talk of rehiring him for the summer of 2005. (Tr. 91) Despite his marina experience, he does not feel that he is qualified to market himself as a mechanic. (Tr. 66, 91) The newer motors are electronic, and he is not familiar with those motors. (Tr. 91)

Claimant reported to his physical therapist that after working his four hour shift at the marina, he was not able to do anything else. (Tr. 61) By the end of his work day, his back would become very sore and painful. (Tr. 61) Upon returning home, he would have to lie down and use his heating pad for an hour or two. (Tr. 62) At the time of the hearing, Claimant felt that his constant pain prevented him from working full time. (Tr. 66)

Since leaving Ocean House Marina, Claimant has resumed his job search (Tr. 67), and has applied for "just about everything," although he could not remember all of the jobs he applied for. (Tr. 64) He has kept his resume up on six different internet employment web sites. (Tr. 63-64) He has also had the help of Kathryn Dzeikan, a vocational counselor. (Tr. 65) He has applied for all jobs for which he feels he is qualified. (Tr. 67)

Claimant went to Home Depot multiple times, and had an interview there prior to the hearing, but no job offer resulted; he was told they would call him if an opening became available. (Tr. 68) He was hired at Wal-Mart, but then discovered the job involved heavy lifting, effectively terminating the offer. (Tr. 68-69) He wrote a letter to Wal-Mart stating he thought it was unfair he was not offered a job due to his handicap. (Tr. 69) In response, the manager called him and offered a people greeter job, but that required Claimant to stand in one position for four hours, which Claimant is unable to do. (Tr. 69-70) The manager informed Claimant his resume would be given to the night managers for possible openings, but Claimant has not heard from them. (Tr. 70)

Claimant also interviewed at Stop and Shop for a position in the deli as a meat slicer. (Tr. 70) He told his interviewer he was willing to try the position, but she did not think he could do it as the position involved lifting and standing at the slicing machine all the time. (Tr. 70)

He also applied for a job at Westerly Hospital as a housekeeper. (Tr. 70) Likewise, that did not result in a job offer because it involved using a big buffing machine, which Claimant could not do. (Tr. 70) He was informed they would keep his application on file, but he has not heard from them since. (Tr. 71)

Claimant contacted many of the employers listed in the labor market surveys provided by Employer, but none offered a job. (Tr. 71, 87) For one of the positions, the telemarketing job in EX 11, the telephone number listed was incorrect, and Claimant was connected to Goodwill instead. (Tr. 71) Claimant stated several of the phone numbers on the labor market survey were incorrect. (Tr. 71)

Claimant also applied for a position at Foxwoods, a casino in Connecticut, but has received no response. (Tr. 72) Claimant has submitted a request in writing to the OWCP Department in Boston requesting help finding a job, but he has not received a response. (Tr. 73)

Claimant testified that one of his hobbies is making jewelry boxes. (Tr. 79) To do this, he uses a band saw, a sander, a small hammer, and a chisel. (Tr. 79) He used to make three a week, but he thinks he has made only three in the last year. (Tr. 79-80) Another hobby is building radio controlled planes. (Tr. 80) As of February 2004, he spent approximately 6 hours a week on this, but at the time of the hearing, he spent only a few hours a week. (Tr. 80-81) He also fishes and has been out a couple times this year. (Tr. 81) He owns a small aluminum boat and is able to manipulate the trailer to take the boat in and out himself. (Tr. 82) When he fishes, he uses lures, requiring him to repeatedly cast out the lure. (Tr. 83) He also enjoys baking, and does so about twice a month. (Tr. 84) Claimant does some of his own grocery shopping, and some cooking for himself and his wife. (Tr. 80)

Claimant is able to send e mails on a computer. (Tr. 83) He types with two or three fingers at a time. (Tr. 63) He has had a Pentium computer for about three years, and he uses the computer about five days a week, mainly for job searching. (Tr. 83) He

is able to search the web. (Tr. 83) He does not know how to create a cover letter. (Tr. 84) Claimant testified that he could work if the job were fairly easy and allowed him to sit or stand. (Tr. 85)

Claimant also testified by deposition on February 19, 2004. (EX D) His deposition testimony echoes his hearing testimony, but offers more details about his condition. Claimant testified that he can walk around the grocery store for approximately 20 minutes, but by the time he is done with his shopping, he has to limp out the door. *Id.* at 18-19. He can sit for about twenty minutes and stand for about a half hour before he becomes uncomfortable. *Id.* He indicated he tries not to travel too far to avoid experiencing pain during the drive. *Id.* at 25.

Claimant acknowledged that he incurred a previous back injury in 1989, for which he sought treatment from Dr. Siciliano. *Id.* at 31. He was paid \$16,000 for the impairment to his hands, which were given an impairment rating of 7% on each hand. *Id.* at 35. He has been working with vocational rehab counselor Kathy Dzeikan, who prepared a resume for Claimant. *Id.* at 43-46. He had applied for a welding job, some assembly jobs, and a woodworking job. *Id.* at 48-49. He also applied for two of the jobs listed on the labor market survey given to him (*see* EX 2). At Charbert, he was told they were not hiring. *Id.* at 53. He tried applying to Cox Communications (*see* EX 2) but he could not successfully execute the computer program he needed to use. *Id.* at 54. Of the jobs offered on the labor market survey (EX 2), he believed the positions in Middletown and Cranston were too far for him to travel. *Id.* at 57. He has never drafted a cover letter, and he does not feel comfortable using a computer in a customer representative capacity. *Id.* at 62-63.

### **Medical Evidence**

#### **Chiropractic Associates of Westerly**

Dr. Siciliano first treated Claimant for a neck injury he sustained in April 1995. (CX 11 at 10) He asked the Claimant not to work for a few days and restricted him to light duty. Claimant again sought treatment from Dr. Siciliano in June 1998 for a work-related cervical neck injury, which led to a finding of permanent partial disability. (CX 11 at 4)

Claimant returned to Dr. Siciliano in December 2000, seeking treatment for his back injury. (CX 11 at 3) Claimant described his pain to Dr. Siciliano and reported that he had gone to both his doctor and the emergency room because of the pain. (CX 11 at 1) Claimant had pain while sitting, walking, and standing. Examination revealed positive valsalva maneuver, cough pain into the left leg, and a lumbar spine spasm. Dr. Siciliano requested an MRI, which revealed a disc protrusion at L5 at S1, touching and displacing the left nerve root. (CX 11 at 2)

#### **Dr. Stanley G. Pugsley**

Dr. Pugsley first saw Claimant on January 11, 2001 on referral from Dr. Siciliano for low back and left leg pain. (CX 3 at 22) Dr. Pugsley reported that the Claimant had lifted a heavy rubber object at work, twisting his back and leading to severe low back and left buttock pain. Despite the discomfort, Claimant continued to work, but standing, walking and bending worsened the condition. In December, the pain began spreading to Claimant's left buttock, posterior thigh and posterior and lateral calf into his left foot. He described the pain as "a burning quality . . . associated with a numb, prickly sensation." Chiropractic manipulations helped, but did not resolve the problem. Vicodin, Oxycontin and nonsteroidals provided no clear benefit.

On examination of the Claimant, Dr. Pugsley noted that he was cautious getting up and down from a chair, and had discomfort with straight leg raising, and hypalgesia along the lateral border of the left calf and foot. Claimant had a minor limp of his left leg. An MRI from Rhode Island demonstrated a bulging disc medial to the neural foramen at L5/S1 on the left, which caused neural entrapment. Dr. Pugsley concluded that Claimant had lumbar radiculopathy secondary to a herniated disc at left L5/S1.

Claimant returned to Dr. Pugsley on March 26, 2001 for follow up. He had completed epidurals a few weeks prior, and reported that his left leg pain was about 40-50% better, but he still had pain daily. Examination revealed more flexibility in his back and no limp. Dr. Pugsley concluded that the Claimant's pain was resolving. He requested that Claimant give him a status report in a few weeks and prescribed Vicodin.

On May 7, 2001, Claimant returned to Dr. Pugsley, and reported that the bulk of his leg discomfort had resolved. (CX 3 at 20) However, he still had a vague sense of numbness along the lateral border of his left foot, and an achy back. A "burning, stinging discomfort" subsided to a "dull irritating ache" when he reduced his activity level. His recent activities at that time included changing a tire on a boat trailer and some light yard work. He stayed away from heavier tasks for fear of exacerbating his condition. At this time, Claimant was receiving chiropractic electrical stimulation, and he took Vicodin for discomfort.

Examination revealed some irritability on palpation of the SI joints and lumbar paraspinous muscles in the region of the sacrum. At forward flexion, Claimant developed back pain, but no leg pain. Dr. Pugsley concluded Claimant's problem was a combination of musculoligamentous back pain and some residual neurogenic pain. He recommended treatment of the muscular problem first, rather than going straight to surgery; he prescribed Tranxene, gentle manipulation of the SI joints, and gentle massage of the paraspinous muscles.

Claimant's back pain flared up again, causing a lot of discomfort in the left buttock and left paraspinous muscles, and increased numbness and prickling in his left lateral calf and foot. He returned to Dr. Pugsley on June 15, 2001. (CX 3 at 19) Despite using Vicodin regularly and getting occasional chiropractic treatment, Claimant believed that his condition was not improving. Examination revealed a flattened lumbar lordosis, uncomfortable lateral flexion to the left, and diminished pin prick in an S1 distribution on

the left. Dr. Pugsley concluded Claimant had recurrent left lumbar radiculopathy. He suspected surgery would be necessary and ordered an MRI.

On July 27, 2001, Dr. Pugsley admitted Claimant to the hospital for a left L5 at S1 laminectomy and discectomy, which occurred on August 2, 2001. (CX 3 at 14) Dr. Pugsley, who performed the operation, noted “a large bulging disc was seen immediately underneath [a nerve root]. This was in fact larger than anticipated from the preoperative MRI.” (CX 3 at 14) Dr. Pugsley “made a cruciate incision directly over the largest aspect of the disc bulge and teased a large subligamentous piece of disc out of its pocket,” eventually decompressing the annular opening. Dr. Pugsley followed up with Claimant on August 10, 2001. Claimant had vague numbness in the lateral aspect of his calf and a mildly achy back.

On September 7, 2001, Claimant reported that the shooting pain was gone. (CX 3 at 12) He had discomfort in his left buttock and numbness in his left posterior thigh, and used occasional Vicodin for pain. Claimant was able to get up and down from a chair well. To compensate for the pain in his left buttock, he sat with his legs crossed. Overall, he was doing well. Dr. Pugsley referred him to Dynamic Physical Therapy for back strengthening and planned to return him to work part time after therapy was completed.

On February 11, 2002 Claimant returned to Dr. Pugsley for a follow up appointment. (CX 3 at 11) He complained about his back, but said his legs were fine. Examination revealed mild flattening of the lumbar lordosis; extremes of forward flexion and back extension produced some reactive spasm. Dr. Kemal had suggested a swimming program, and Dr. Pugsley encouraged Claimant to participate.

Dr. Pugsley saw Claimant on July 11, 2002. (CX 3 at 6) Since his last visit, Claimant had developed increased back pain and discomfort in his left posterior and lateral thigh and the upper part of his calf. He reported that he had shooting pain down his leg when he stretched it out in the car, and that bending and twisting aggravated his back and left leg. Claimant used Ultram and occasionally Percocet for pain control. On examination of the Claimant, Dr. Pugsley noted normal lumbar lordosis with tenderness in the middle of the incision. Claimant had diminished pin prick sensations along the lateral border of the left foot. Dr. Pugsley concluded Claimant had back and left leg pain of unclear etiology, and planned to have him undergo a lumbar MRI with gadolinium.

An August 4, 2002 x-ray revealed a small left lateral disc herniation at the L4 at 5 level without significant interval change since the previous study. (CX 3 at 7) At the L5/S1 level, there was some mild disc space narrowing and left-sided epidural scarring. Dr. Pugsley instructed the Claimant to consider surgery if he was not doing well.

Dr. Pugsley saw Claimant on October 18, 2002. (CX 3 at 10) Claimant reported that he continued to have problems with back and left leg pain, with the back pain being worse. The pain disrupted his quality of life and he had been laid off of work because he could not perform his tasks due to the pain. The Ultram prescribed by Dr. Pugsley

during his last visit did not help the pain. Dr. Pugsley concluded that the Claimant had lumbar radiculopathy due to a combination of arachnoiditis and disc bulge. Believing a second opinion was necessary, Dr. Pugsley suggested that Dr. Maletz examine Claimant. Dr. Pugsley also prescribed Vicodin.

Claimant saw Dr. Pugsley on August 29, 2003. (CX 3 at 5) He had received a sacroiliac joint injection on the left, but his pain remained unremitting. Claimant also reported loss of feeling in his left leg. Dr. Pugsley noted tenderness over the sacroiliac joint on the left, with minimal tenderness over the joint on the right. Sensory examination over the lateral border of the left calf was diminished. The Claimant was very cautious getting up and down from a chair. Dr. Pugsley concluded that the Claimant's primary symptoms were sacroiliac joint dysfunction. He recommended Lidoderm patches and gave him samples. If that did not help, Dr. Pugsley planned to refer Claimant to physical therapy for transcutaneous electrical nerve stimulation. *Id.*

On October 24, 2003, Dr. Pugsley indicated that the Claimant was "Disabled for work from October 24<sup>th</sup> until December 25<sup>th</sup> 2003." (CX 3 at 3) On November 3, 2003, Dr. Pugsley completed a U.S. Department of Labor Work Capacity Evaluation Musculoskeletal Conditions, putting Claimant on temporary total disability until December 25, 2003.

Dr. Pugsley completed a U.S. Department of Labor Work Capacity Evaluation for Musculoskeletal Conditions on January 13, 2004. (CX 2) Dr. Pugsley believed Claimant was not capable of performing his usual employment due to "severe peroneural fibrosis of [the] lumbar spine." The assessment reported maximum medical improvement had been reached, and permanently limited Claimant to four hours a day doing sedentary work.

Dr. Pugsley wrote a progress report after examining Claimant on January 30, 2004. (CX 3 at 1) Claimant stated his back was very uncomfortable, and he had an appointment for a follow up visit with a specialist in Boston, even though the compensation commission had not yet authorized the visit. After examination, Dr. Pugsley stated that the Claimant had low back pain related to lumbar perineural fibrosis. At that time, he nothing to offer Claimant and recommended follow up with the specialist in Boston to get the benefit of a full evaluation.

Dr. Pugsley wrote a letter on March 6, 2004 to Employer stating that Claimant should be examined by a pain specialist in Boston. (CX 3 at 2) Dr. Pugsley wrote that if the workmen's compensation commissioner thought no more evaluations should be carried out, then he believed sedentary employment would be all that Claimant could endure with his back condition.

*Lawrence and Memorial Hospital Pain Clinic*

Claimant was referred to the Pain Clinic and Dr. Feng by Dr. Maletz, and his first visit with Dr. Feng was on January 21, 2003. (CX 4 at 18) Claimant reported having on

and off low back pain since July 2000. Acute onset of this pain led to a discectomy in August 2001, which brought some temporary relief. Land and water physical therapy brought no significant benefit and he continued to have pain in the low back with radiation into the left hip/buttock area down into his knee with numbness, tingling, and burning sensations into his foot. Claimant explained that any type of activity exacerbated his pain, but that the discomfort was relieved when sitting. He was taking Ultram at the time of the appointment. Vioxx and Motrin had provided no significant benefit.

Claimant had limited range of motion and flexion in his lumbar spine. An MRI revealed left sided epidural scarring at the L5/ S1 surgical site and a small left lateral disk herniation at L4/5, unchanged from July 2001. Dr. Feng concluded Claimant had continued lumbar radiculopathy possibly related to scar formation from the surgical site combined with a small L4/5 herniation.

Dr. Feng recommended that Claimant undergo three steroidal injections, and these were done on February 19, 2003, March 6, 2003 and March 20, 2003, with the first two bringing no benefit. (CX 4 at 16, 14, and 12) Dr. Kadian started Claimant on Neurontin after the last injection. (CX at 12)

Claimant followed up with Dr. Kadian on April 28, 2003, complaining of pain in the lower lumbar region with numbness and pain in the posterior thigh, calf, and plantar surface of the left foot. (CX 4 at 11) Dr. Kadian prescribed Neurontin and scheduled a selective nerve root block in the left S1, which Claimant underwent on June 19, 2003. (CX 4 at 9) Because Claimant received minimal benefit from this, Dr. Kadian performed a second selective nerve root block on the left side at S1 and L5 on July 10, 2003 and instructed Claimant to take Darvocet. (CX 4 at 7)

Claimant reported feeling some improvement after these two nerve blocks, but he experienced pain if he did too much by the end of the day. (CX 4 at 5) Dr. Feng therefore performed a transforaminal steroid injection after epidurogram on July 24, 2003, injecting Optiray at the epidural space. (CX 4 at 5) The dye clearly spread into the epidural space, outlining both L5, S1, and the neural foramen. Depo-Medrol was then injected and the dye washed away. Dr. Feng referred Claimant to physical therapy and considered doing another injection with more steroids to loosen up the scar tissue.

Claimant followed up with Dr. Feng on September 5, 2003, reporting significant improvement in his left leg pain since the last nerve root block. (CX 4 at 4) However, his back pain had started to increase. Noting limited range of motion in Claimant's lumbar spine and significant left paraspinous tenderness, Dr. Feng felt that the Claimant suffered from post laminectomy syndrome. He performed a facet joint injection on the left at L3-4, L4-5, and S1 on October 29, 2003. (CX 4 at 2) However, on November 11, 2003, Claimant reported that he continued to experience a lot of pain. (CX 4 at 1) Dr. Feng restarted Neurontin, but with no benefit. A second injection was scheduled for this visit, but Claimant decided to not go through with it, because his symptoms got worse after the last injection. Dr. Feng concluded Claimant suffered from degenerative joint disease of the lumbar spine with possible facet syndrome and post laminectomy

syndrome. Claimant requested a referral for a second opinion, and Dr. Feng referred him to the Beth Israel Pain Medical Center Pain Management Center in Boston for further evaluation.

On August 23, 2004, after the unsuccessful injections, Dr. Feng suggested that the Claimant try a long-term opioid management trial period. (CX 5 at 2) After Claimant started using a Duragesic patch, his pain appeared reasonably controlled. He reported that he was working four hours a day and was “very happy” with his job. His wife reported that the Claimant’s depression had also improved. The opioid dosage was increased to allow Claimant to work well. Dr. Feng concluded Claimant had postlaminectomy syndrome and had failed conservative treatment. Claimant decided to proceed with a spinal cord stimulator implantation, as he believed he needed more pain control to function after work hours. Dr. Feng continued prescribing Duragesic patches and Ultram.

Dr. Feng saw Claimant for a preoperative visit on January 10, 2005. He remarked that Dr. Pugsley had no surgical alternatives for Claimant, and that the Claimant had “failed conservative modalities, injections, physical therapy, as well as medical management with increasing narcotics.”

Dr. Kadian implanted a spinal cord stimulator with Octad lead in Claimant’s back on January 17, 2005. (CX 12 at 3) However, Dr. Kadian removed the stimulator 10 days after its implantation because Claimant “did not like the stimulation although most of the stimulation was covering most of his back as well as leg . . .” (CX 14 at 5) Dr. Kadian stated Claimant “did not convince himself for permanent placement of the lead.” A handwritten, partially illegible addendum dated January 28, 2005 reads “Failed spinal cord stimulator trial . . . we will take it out today. Patient denies any interval change . . .” (CX 5 at 4) Another note stated that the stimulator gave the Claimant no relief from pain. (CX 14 at 8)

*Soundview Orthopaedic Associates*

Dr. Gaccione evaluated Claimant on January 19, 2004. (CX 6) Despite surgery, injections, and physical therapy Claimant continued to experience significant back pain on a regular basis. He spent his days resting with a heating pad; his medications included Skelaxin, Ibuprofen, Neurontin, Zanaflex and Ultram. He experienced weakness in his left lower extremity and centralized pain in his lower back and left buttocks, and numbness in his left foot. He reported that he had given up outside interests other than occasional fishing.

During the examination, Claimant preferred to stand. He appeared depressed when discussing his condition. He had mild residual spasm and limited flexion and extension. Sensory examination was limited on the left heel. Upon internal and external rotation of the left hip at 90 degrees flexion, Claimant became tearful due to the discomfort. Dr. Gaccione diagnosed Claimant with chronic low back pain with residual

left lumbar radicular symptoms following an L5/S1 discectomy. He considered Claimant's prognosis to be fair with a high likelihood of continued symptoms.

Dr. Gaccione reported that, based on the history provided by the Claimant and the medical records available for review, there was a causal relationship between the July 26, 2000 injury and the Claimant's ongoing back condition. Dr. Gaccione agreed that the Claimant should be seen by the Boston specialist and should pursue an anti-depressant therapy as well. He believed Claimant had reached maximum medical improvement, and calculated the Claimant's level of impairment of the whole person to be at 10% based on Table 15 at 7, Section 2E on page 404 of The AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. This was converted to a regional lumbar spine impairment of 14%, fully apportioned to the July 2000 injury, as there was no pre-existing condition. Dr. Gaccione believed Claimant could only perform sedentary work with a 5 pound lifting restriction and no bending, twisting, climbing or crawling.

Thames River Orthopaedic Group

Claimant was referred to Dr. Frank W. Maletz by Pain Management Services. (CX 7 at 1) His first visit was December 2, 2002 for left sided back pain. Claimant was not working at the time of this appointment. Upon examination, Claimant was tender over the iliolumbar spine and the proximal aspect of the SI joint. He had limited flexion and extension; he rotated to the left and right approximately thirty degrees. Dr. Maletz obtained flexion and extension lumbar spine laterals. On review, Dr. Maletz noted the left sided S1 nerve root was caught in some scar tissue in the lateral recess on the side of his complaint, and he believed epidural steroids could possibly loosen the nerve root from its scar bed. With strength and training, he felt Claimant could be mobilized. Dr. Maletz did not feel spinal fusion would be necessary.

Lawrence and Memorial Hospital, Physical Therapy Department

Claimant first went for physical therapy July 19, 2004.<sup>3</sup> (CX 8 at 1) Erika Brault, MSPT, noted that the Claimant changed positions and posture often, due to low back pain, and that he had decreased strength in his left lower extremity. Claimant reported his pain was worst some days after four hours of work, and that he was unable to do anything else on work days. Ms. Brault commented that the Claimant had signs of muscle atrophy in his lumbo-sacral musculature. Soft tissue fullness was localized to the L3/5 area. Claimant's functional limitations included difficulty with lower body dressing. Long term goals included increased independence with a TENS unit and decreased pain.

Claimant went through physical therapy treatment seven times between March 7, 2002 and March 28, 2002. See CX 8 at 7 at 13. His therapy involved aquatic exercises, including shallow walk, freestyle, functional leg program, shallow upper extremity

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<sup>3</sup> A note in the records indicates that the Claimant stated "I'm not here for therapy, I'm here to try a TENS unit."

program, and a 5 minute format of running, skiing and scissors. Therapy was concluded March 28, 2002 due to continued pain, rated as a 3 on a scale of 1 to 10.

Thomas J. Masterson, M.D.

Dr. Masterson saw Claimant on October 1, 2001 for numbness and tingling in his hands. (CX 13) Claimant reported difficulty holding onto things and driving, especially in cold weather. Due to this change, he had stopped skiing. Dr. Masterson concluded that the Claimant showed signs of mild carpal tunnel syndrome bilaterally. He noted what he felt to be Claimant's larger problem: a vibrating white finger syndrome. He felt a vascular study should be carried out before assigning Claimant any rating.

A February 11, 2002 review of the vascular study showed a lack of return to initial base line temperatures 20 minutes following immersion in cold water, indicating some residual vibratory white finger. (CX 13 at 3) Dr. Masterson again stated that he thought this was a sign of mild carpal tunnel syndrome and, based on the AMA guide to physical impairment fifth edition, he assigned Claimant an 8% loss of use of his hands bilaterally due to vibratory white finger syndrome and a 4% loss of the wrists bilaterally.

Dr. Philo F. Willetts, Jr.

Dr. Willetts, an orthopaedic surgeon, examined Claimant on March 4, 2003 on behalf of Employer. (EX 4) Dr. Willetts had seen Claimant in April 2002 with respect to his hand injury. When asked to quantitate his back pain, Claimant rated it a 6 or 7 before the August surgery, a 10 (the maximum) immediately before his surgery, and a 6 at the time of this examination. Claimant reported that he had reached maximum improvement one year earlier and had no change since then.

Claimant informed Dr. Willetts that he could stand for a half hour, walk 200 feet, and sit and drive "all right." His condition improved upon lying down, applying heat, using his hot tub, and taking medication. Claimant's activities included doing housework for one half-hour a day, reading for one half-hour a day, watching television six hours a day, and occasionally doing woodwork at home.

Taking into consideration his examination and his review of the medical records, Dr. Willetts diagnosed Claimant with probable postoperative scarring and a small disc bulge at left L4/5, "with no sign of disc herniation." He felt that it was reasonable to continue the course of epidural steroids to improve Claimant's condition, stressing it was only possible, but not probable, that they would produce satisfactory symptom improvement. He further stated that repeat surgery would only possibly produce long-term benefits, and some degree of scar reformation. He felt that a reasonable exercise program would be the most reasonable course, but that the Claimant had probably reached maximum medical improvement. (EX 4 at 23)

Dr. Willetts did not believe that the Claimant could return to his work at Electric Boat. He thought Claimant would benefit from a limited duty position that would allow

him to avoid frequently lifting more than 15 pounds. According to Dr. Willetts, Claimant could sit, stand, walk and drive if he occasionally changed positions for comfort. Dr. Willetts also advised that Claimant should avoid using vibrational tools and rapid, forceful, repetitive hand activities.

### **Vocational Evidence**

Paul F. Murgo, M.Ed., CRC, CLCP, CDMS, CCM

On February 23, 2004, Paul F. Murgo, vocational rehabilitation counselor, met with Mr. Mulholland at the request of Claimant's counsel. (CX 1 at 1) He performed a Vocational Assessment and Employability Evaluation. Mr. Murgo reviewed and incorporated information from the Claimant's medical records. The Claimant was not employed at the time of this exam.

Claimant reported difficulty sitting and standing, and was actually standing in the waiting room when Mr. Murgo greeted him. He changed positions frequently during the exam to minimize pain. Claimant described difficulty sleeping, and stated he slept only two hours the night before due to pain.

Claimant informed Mr. Murgo that his activities of daily living are intermittent and designed to consume time rather than to be productive. He typically watches television, straightens up the kitchen, does laundry, sits in his yard, reads woodworking magazines, and visits with nearby family. Sometimes he cooks and grocery shops. Other people perform the more laborious yard work, and he recently purchased a rider mower despite the fact that he has a small yard. His ability to drive is limited by back pain. He walks through Home Depot for exercise in the winter.

The tests administered by Mr. Murgo<sup>4</sup> indicated Claimant had average reading ability, and borderline math and spelling abilities. His scores were consistent with individuals who had completed 14 grades of formal education. Mr. Murgo concluded that the Claimant has above-average cognitive ability, but that he lacked in academic preparation. Mr. Murgo also rated Claimant's work history as semiskilled to skilled in terms of the amount of time needed to learn the techniques, acquire the information and develop the facility for average performance in a specific job-worker situation.

Mr. Murgo concluded that the Claimant had marginal and limited access to employment because of the restrictions imposed by physicians. He believed that "[t]he methods used, as well as the employers to whom he has applied and the positions he has sought are appropriate considering his work history." At the time of this appointment, Claimant was participating in vocational rehabilitation services in order to obtain employment. Mr. Murgo felt that the Claimant's inability to secure competitive employment over an extended time frame was a more accurate indicator of his

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<sup>4</sup> Mr. Murgo administered the Wide Range Achievement Test (WRAT-R3) and Wonderlic Personnel Test (WPT-Form A) to evaluate Claimant's level of academic achievement and cognitive ability.

employability than his opinion. Even if he found a job, whether he could sustain competitive employment depended on his status.

Mr. Murgo updated his report on February 17, 2005 after discovering that the Claimant had obtained the part-time job at the marina, earning \$10.00 per hour. (CX 1 at 7) This job required no lifting, and the Claimant had the assistance of co-workers for heavier tasks. The Claimant had to stand while he worked. He was let go in September 2004 when the marina could no longer accommodate his limitations. While Claimant still sought employment, Mr. Murgo felt that he was incapable of competing for and sustaining full time competitive employment. CX 1 at 8.

Mr. Murgo also testified by deposition on March 4, 2005. (CX 22) His testimony essentially mirrors what he stated in his report. He indicated that the Claimant's medical restrictions severely limit his job options. *Id.* at 16-18. He discussed sheltered employment, stating that Claimant's marina position was not pure sheltered employment, but that it was certainly not a typical competitive environment, because they accommodated him. Mr. Murgo did not think that the Claimant had been rehabilitated; if Claimant had been successfully rehabilitated, he should have been able to re-enter the workforce as a mechanic. *Id.* at 31-32. Mr. Murgo believed that because Claimant had to increase his medication in order to handle working at the marina and because he had gone through basically all of his treatment options, his employment at the marina would have been short-lived even if he had been given the opportunity to stay. *Id.* at 62-63.

#### Miles Rehabilitation Services

Judy Miles, MS, CRC, CCM, wrote a report dated July 19, 2002. (CX 10 at 1) At the time, Claimant was waiting for Dr. Pugsley to schedule an MRI; he wanted confirmation that he did not have another disc herniation. Ms. Miles reported that the Claimant appeared to be highly motivated to return to work at Electric Boat. He informed Ms. Miles that he could return to his job of mixing rubber if he did not have to lift a carbon bag once a day.

A report dated November 5, 2002 indicates that Dr. Pugsley filled out the OWCP 5 report stating that the Claimant was unable to return to work. (CX 10 at 7) Dr. Pugsley referred Claimant to a spinal orthopedist for a surgical consult. Ms. Miles believed that "the feasibility of [Claimant's] success will depend on the surgical consult."

A December 11, 2002 report reflected that the Claimant saw Dr. Maletz, who recommended steroid injections. (CX 10 at 9) If the injections did not work, they would consider surgery. A March 19, 2003 report noted that a vocational plan could not be assessed due to Claimant's status. (CX 10 at 13) A July 8, 2003 report indicated that the Claimant had a lot of difficulty scheduling appointments. (CX 10 at 15)

#### Kathryn Dziekan

Kathryn Dziekan, MS, CRC, met with Claimant on October 24, 2003. (CX 9) he reported being injured and taking Nabumetone, Tramene, and Liboderm Patch for his pain. Claimant and Ms. Dziekan discussed Claimant's concern over Employer's reduction of compensation, and they went over his resume. Claimant informed Ms. Dziekan on October 27, 2003 that his doctor had instructed him to not work until after December 25, 2003, when his pain injections were completed.

Ms. Dziekan felt that the Claimant was motivated to return to work and would like to return to Electric Boat if he could, but that he had medical restrictions that could impair his ability to return to work. Claimant's long term goal was to successfully return to some type of work.

Concentra / Elizabeth Sinatro

Ms. Elizabeth Sinatro, a certified rehabilitation counselor with Concentra Integrated Services, prepared two labor market surveys on behalf of Employer dated September 30, 2003 and March 31, 2004. (EX 2 and 3) She also testified by deposition on May 12, 2004. (EX 8) To prepare for her deposition, Ms. Sinatro reviewed both parties' trial exhibits and attended Claimant's deposition. *Id.* at 6. She also conducted a vocational assessment interview with Claimant on September 4, 2003. *Id.* at 6-7.

Ms. Sinatro believes that the Claimant has a dedicated and extensive work history with Employer. She noted his motivation to return to work and commented on his hobbies, which include woodworking, fishing and making airplane models. *Id.* at 7.

When preparing her labor market surveys, she identified occupations she thought Claimant would be able to perform given his work experience and functionality, and equated the wages to what they would have been at the time of Claimant's injury. *Id.* at 9, 15-16. She then researched the labor market and contacted employers to find suitable positions. *Id.* at 9. She believes the jobs she proposed are consistent with the restrictions imposed by Dr. Willetts, Dr. Gaccione, and Dr. Pugsley. *Id.* at 9, 16-17. She concluded that the Claimant has an earning capacity based on his transferable skills and functionality, and explained that he has an equal opportunity to apply for the positions. *Id.* at 11. She also believes he would be able to maintain any of the listed positions. *Id.* at 13.

Commenting on Claimant's inability to secure a job despite his efforts, Ms. Sinatro stated that he may not be applying for positions that are appropriate for him. *Id.* at 20-21. She noted that some of the applied-for positions exceed his physical ability. *Id.*

Of the positions she recommended in her labor market surveys, Ms. Sinatro was unable to say whether the assembler jobs involved frequent and repetitive hand use, required Claimant to work at a production pace, or allowed him to walk around as needed for his condition. *Id.* at 25-26. She admitted that the Claimant was unqualified for the customer service positions she recommended, but pointed out the Employer provides paid training. *Id.* at 30-31. Ms. Sinatro admitted that the Claimant did not have a professional

level of computer skills, but maintained that he does have the ability to draft a document. *Id.* at 36. Based on her encounters with Claimant, Ms. Sinatra believes that he has fine communication skills, as required by the customer service positions. *Id.* at 40. She could not state where the actual work sites were for the U.S. Securities guard jobs, and she did not know if Claimant would be able to walk the grounds of any particular facility. *Id.* at 46-47. She stressed that the positions all fit within the health parameters she was given. *Id.* at 47.

*Concentra / Kirsten Sue Dillingham*

Kirsten Dillingham, a certified rehabilitation counselor with Concentra, created two labor market surveys dated January 27, 2005 and March 11, 2005 and listed various proposed jobs for Claimant. (See EX 10 and 11) She also testified by deposition on April 21, 2005. (EX 14)

Ms. Dillingham conducted a vocational assessment interview of Claimant on April 8, 2005, in the presence of his attorney. (EX 14 at 12) Claimant informed Ms. Dillingham that he hates using the telephone and that he drops pens if he uses them for a long time. *Id.* at 17. Claimant stated that he enjoys interacting with people. *Id.* at 18. Ms. Dillingham agreed that Claimant has done a significant amount of job search on his own. *Id.*

Regarding Claimant's cognitive ability, Ms. Dillingham believes that he would be able to learn new skills, given that he has never been a motor boat mechanic before, but was able to succeed in his tasks at the marina. *Id.* at 19. With vocational training, Ms. Dillingham believes Claimant would be more likely to obtain work. *Id.* at 20.

Ms. Dillingham believes that the Claimant has already re-entered the workforce, based on the fact that he worked continually for the industry standard of 60 days. *Id.* at 21. She stated that his increased medication dosages do not change her conclusion that he worked continually and became rehabilitated. *Id.* at 21-23.

Ms. Dillingham believes the jobs listed on her labor market surveys are consistent with the restrictions imposed by Claimant's doctors, and the positions were open and available at the time of the surveys. *Id.* at 26-27. She believes the nursing home position that may have required Claimant to do laundry would have been inappropriate, but that positions were available at the establishment that did not require tending to laundry. *Id.* at 28. Ms. Dillingham also believes Claimant may have difficulty with jobs requiring computer skills, but she would not discourage him from applying. *Id.* at 29-30.

Ms. Dillingham pointed out that the Claimant had an earning capacity, and could perhaps apply again to the marina for a seasonal job. *Id.* at 32. In her opinion, the Claimant has transferable skills and no cognitive impairment. *Id.* at 33. Ms. Dillingham believes Claimant has "as much a chance as anyone" in obtaining the positions listed on her labor market surveys. *Id.* at 34. She felt that the Claimant has a competitive edge for the assembly positions because he is mechanically inclined, and that he would be able to

learn the tasks required for other positions. *Id.* at 35. While Ms. Dillingham believes Claimant's work history is a good indicator of his ability to maintain a job, she was unwilling to state whether or not he would be able to maintain any employment. *Id.* at 37-38.

Anticipating that the Claimant might apply for and be rejected from some of the listed positions, Ms. Dillingham stated that the labor market is tough right now, and many people may be applying for one position. *Id.* at 39-40. Additionally, the positions may no longer be open, or Claimant may not interview well. *Id.* at 40. She also relied on these facts to explain why Claimant has not been able to obtain employment through his own job search efforts. *Id.* at 41. But she believed that the Claimant has been rehabilitated to be in the workforce. *Id.* at 47.

Ms. Dillingham admitted that the security guard positions may not allow Claimant to walk about as needed. *Id.* at 44. Additionally, because the jobs require drug tests, she recommended Claimant discuss his health situation with the employers before applying, in an effort to bypass the screening requirement. *Id.* at 54-58, 72-73. She also admitted that Claimant may have a difficult time obtaining an assembler position, because he is restricted from performing repetitive hand movements. *Id.* at 53. Ms. Dillingham agreed that the sales position offered requires a minimum number of leads to be generated and that a fee may be charged to hook the employee's phone up to the service. *Id.* at 60-61. She believed that the Claimant's interpersonal skills qualify him for jobs requiring "excellent communication skills." *Id.* at 71.

## **II. Stipulations**

The parties have stipulated, and based on the record I find the following:

1. 33 U.S.C. § 901 *et seq.* (LWHCA) is applicable to this claim.
2. Claimant sustained an injury to his back on July 26, 2000 while working for Employer, and the injury was in the course of and arising out of Claimant's employment with Employer.
3. The claim was timely noticed and timely filed.
4. Claimant's pre-injury average weekly wage was \$879.59.
5. Claimant's compensation rate for the period of May 17, 2004 to September 20, 2004 is \$469.73.
6. Claimant reached maximum medical improvement as of January 13, 2004.
7. Claimant is entitled to compensation and medical benefits.
8. Employer is currently providing compensation and medical benefits.
9. Claimant does not have outstanding medical bills.
10. Claimant is not currently working.

## **III. Issues**

1. The nature and extent of the Claimant's injury.

2. Whether the Claimant has a wage earning capacity.

(ALJ 2 at 5)

#### **IV. Discussion**

Under the Act, a longshoreman's inability to work due to a work-related injury is addressed in terms of the nature of the disability (permanent or temporary) and extent of the disability (total or partial). In a claim for disability compensation, the claimant has the burden of proving, through the preponderance of the evidence, both the nature and extent of disability. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 59 (1985).

##### Extent of disability

The parties have stipulated, and the record supports the conclusion that Claimant suffers from a permanent disability to his back as a result of the July 26, 2000 injury. Post-Hearing Brief of Electric Boat Corporation at 1-2 (June 30, 2005). Thus, it remains to determine the extent of that disability—i.e., whether Claimant's disability is partial or total.<sup>5</sup>

Claimant bears the burden of proving the extent of his disability. *Trask*, 17 BRBS at 59. The question of extent of disability is an economic as well as medical concept. *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1<sup>st</sup> Cir. 1940); *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Rinaldi v. General Dynamics Corporation*, 25 BRBS 128, 131 (1991). To establish a *prima facie* case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988); *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984). If the employee establishes his *prima facie* case, the burden shifts to the employer to establish the availability of suitable alternative employment. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9<sup>th</sup> Cir. 1993). Should the employer fail to satisfy its burden, the extent of a claimant's disability will be deemed total. *See Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988).

Claimant need not establish that he cannot return to *any* employment, but only that he cannot return to his former employment. *Elliot v. C & P Tel. Co.*, 16 BRBS 89 (1984). Employer does not contend that Claimant can perform his regular duties as a carpenter or rubber mixer. Furthermore, the record contains credible evidence that Claimant's employment must be restricted to part-time stationary jobs that require little to no lifting, unlike his former positions with Employer. Given this information, I find Claimant is unable to return to his former employment, and thus is totally disabled. *See Eastern S.S. Lines v. Monahan*, 110 F.2d 840, 841 (1<sup>st</sup> Cir. 1940) ("There is no actual inconsistency between a man being totally disabled for the purposes of the

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<sup>5</sup> The parties agree Claimant was partially disabled from May 12, 2004 to September 20, 2004. Claimant's Brief at 8 (June 27, 2005).

Longshoremen's and Harbor Workers' Compensation Act, and possessing a present ability to do work of a very limited nature."); *Seals v. Ingalls Shipbuilding, Div. of Litton Sys.*, 8 BRBS 182 (1978) (holding sporadic post-injury work does not rule out permanent total disability).

Because Claimant's work-related back injury precludes his return to his usual employment, the burden rests upon Employer to demonstrate the existence of suitable alternative employment in the area. If Employer does not carry this burden, Mr. Mulholland is entitled to a finding of total disability. *American Stevedores, Inc. v. Salzano*, 538 F.2d 933 (2d Cir. 1976); *Rinaldi*, 25 BRBS 128, 131 (holding that a claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment).

#### Suitable Alternative Employment

In order to meet its burden, the employer must show the availability of job opportunities within the geographical area in which Claimant was injured or in which Claimant resides, which he can perform given his age, education, work experience and physical restrictions, and for which he can compete and reasonably secure. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042 at 43 (5<sup>th</sup> Cir. 1981); *see Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 592 F.2d 762, 765, 10 BRBS 81, 86 at 87 (4<sup>th</sup> Cir. 1979). Employer must also show the precise nature, terms and availability of the proposed positions. *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94, 97 (1988); *Price v. Dravo Corp.*, 20 BRBS 94 (1987); *Rieche v. Tracor Marine*, 16 BRBS 272 (1984); *Daniele v. Bromfield Corp.*, 11 BRBS 801 (1980). Here, Employer submitted four labor market research reports completed by two vocational rehabilitation specialists listing proposed suitable alternative employment opportunities. Claimant submitted a vocational assessment performed by Paul Murgio. (CX 1)

Ms. Sinatro prepared two labor market research studies on behalf of Employer. (EX 2 and 3) She also testified by deposition on May 12, 2004. (EX 8) She concluded that the Claimant had transferable skills and that he would be able to perform any of the positions listed in her research studies. However, these studies do not indicate whether the identified jobs were available on the relevant date. As discussed at the hearing Ms. Sinatro's labor market studies were prepared before May 17, 2004, and thus they are not relevant, because the Claimant was on total disability status at that time, and there was no controversy regarding his disability status. Counsel for the Employer stated that, since the period of time at issue is from September 2004 onward, these studies were not "something the Court has to be too preoccupied with." (Tr. at 12) I admitted these studies not on the question of whether they establish suitable alternate employment, but as they relate to the Claimant's general education and work skills (Tr. at 12).

Ms. Dillingham performed two labor market research studies on behalf of Employer, dated January 27, 2005 and March 11, 2005, to determine whether suitable

alternate employment existed in the Rhode Island area.<sup>6</sup> (EX 10 and 11) While Ms. Dillingham questioned Claimant's ability to maintain any employment (EX 14 at 36-38), she concluded that he would be able to obtain a number of jobs located in the general vicinity of Wakefield, Rhode Island.<sup>7</sup>

On behalf of Claimant, Mr. Murgo completed two vocational assessment evaluations concerning Claimant, dated March 2, 2004 and February 17, 2005. (CX 1) He reviewed Claimant's medical records and considered Claimant's educational background, and performed vocational tests, including the Wide Range Achievement Test and the Wonderlic Personnel Test. Mr. Murgo believed Claimant's "inability to secure competitive employment" despite his search efforts indicated his lack of employability. He questioned Claimant's ability to sustain employment even if he succeeded in obtaining a job.

After reviewing the reports and the testimony, I find that the Employer has failed to provide suitable alternative employment options for Claimant. I note at the outset that I had the opportunity to observe the Claimant in the courtroom, and as he testified. I found the Claimant to be a forthright and credible witness, and I accept his testimony regarding his constant, unremitting pain, as well as his difficulties in driving any distance. I also note that the Claimant is on a daily regimen of narcotic painkillers, that I find could potentially have an effect on his ability to drive, as well as his ability to devote his attention and concentration to job tasks.

The majority of the proposed positions are quite a distance from Claimant's home, and thus fail to meet his physical restrictions. Claimant testified that he tries to travel no more than 15 to 20 minutes at a time, because his back becomes sore after traveling approximately 20 miles. (EX 8 at 25) He testified that the positions located in Cranston and Middletown are too far for him to drive in his condition. (See EX 8 at 57) For many of the other jobs, Claimant would have to travel 17 miles or more one way. (See EX 10, 11) Given Claimant's condition, I find that this distance is unreasonable. I note, for example, that the Claimant arrived at the hearing forty minutes early to allow himself enough time to walk around the parking lot for pain relief after his 35-40 minute drive. (Tr. 55) I find that a job that requires the Claimant to drive for an uncomfortable distance is not suitable alternative employment.

Despite the unreasonable distance that the Claimant would have to travel to reach these jobs, many of the individual positions fail to comply with his physical restrictions and vocational limitations. Specifically, Employer identified two assembler positions. But Ms. Dillingham was only able to confirm that one of these jobs did not require the use of vibrational tools. (EX 14 at 31, 51) But the Employer did not provide information to show that this position, with Staffing America, did not involve repetitive use of the hands, a restriction imposed by Dr. Willetts. (See EX 14 at 51-52, EX 4)

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<sup>6</sup> Ms. Dillingham admitted in her deposition that she did not have all of Claimant's relevant medical information for the January 27, 2005 study. (EX 14 at 24-25)

<sup>7</sup> Ms. Dillingham also prepared a list of marinas; it did not specifically list jobs (EX 13).

Employer also identified several possible security guard positions. However, Ms. Dillingham acknowledged that all of these positions would likely require that Claimant pass a drug test. (EX 14 at 54-57) Given that Claimant takes multiple medications for his pain, some of them narcotics, it is a reasonable inference that he would fail these tests, precluding his employment as a security guard. Nor could Ms. Dillingham say whether Claimant would be able to walk about as needed.<sup>8</sup> (EX 14 at 43-44)

Similarly, other positions fail to accommodate Claimant's needs. Since Claimant would need to stay in one place to answer phones and make calls, the position of call counselor would not allow him to walk around as needed. (EX 11 at 54) Working as an overnight monitor would not be suitable for Claimant, who already has difficulty sleeping. (EX 14 at 59)

Many of the positions likewise fail to meet Claimant's vocational qualifications. *See Uglesich v. Stevedoring Servs. of America*, 24 BRBS 180 (1991) (holding that jobs identified by the vocational counselor did not constitute suitable alternate employment when there was doubt as to whether the employee could perform the jobs due to his education and physical restrictions). The positions of security dispatcher (EX 10 at 48 and EX 14 at 53), telemarketer (EX 11 at 55), and the various customer service representative positions (*See* EX 14) all require that Claimant have at least basic computer knowledge or good communication skills, sometimes both. Nothing in the record indicates that Claimant has a basic level of computer knowledge. Even though some of these positions specify that they provide training for new employees, the job descriptions list computer skills as "Skills Credentials Required," indicating the potential employee needs to have some basic computer knowledge *before* he will be considered for those positions. While Claimant may have prepared a resume on his own, the rudimentary nature of this resume fails to show that the Claimant possesses computer skills. (CX 15 at 46, EX 14 at 80) Claimant remarked in his deposition that he does not feel he is qualified to perform computer work to respond to customer phone calls and that he did not know how to prepare a cover letter, indicating that he does not have basic computer skills. (EX D at 62, Tr. at 84)

While Claimant may have interpersonal skills, as noted by Ms. Dillingham (EX 14 at 71), his communication skills are questionable, as he has never maintained a professional position that tested his communication abilities. Furthermore, Claimant applied for some of the positions offered by Ms. Dillingham, only to discover that the phone numbers listed were incorrect. (Tr. 71) I therefore find the positions of security dispatcher, telemarketer, and customer service representative are unsuitable for Claimant.

Finally, the positions that allow Claimant to work from home, while potentially a good idea, fail to provide the precise nature, terms and availability of the proposed positions. *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94, 97 (1988); *Price v. Dravo Corp.*, 20 BRBS 94 (1987); *Rieche v. Tracor Marine*, 16 BRBS 272

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<sup>8</sup> If the vocational expert is uncertain whether the positions which she identified are compatible with the claimant's physical and mental capabilities, the expert's opinion cannot meet the employer's burden. *Uglesich v. Stevedoring Servs. of America*, 24 BRBS 180 (1991).

(1984); *Daniele v. Bromfield Corp.*, 11 BRBS 801 (1980). The customer service position may require Claimant to pay a fee to set up his phone. (EX 14 at 16 and at Depo Exhibit 3) Further, the job may require a minimum number of presentations to be made a week. But Ms. Dillingham could not say if this was the case, or the length of time it generally takes to do this before compensation is paid. *Id.* Ms. Dillingham acknowledged that the pay for the at-home envelope stuffer position was speculative. (EX 14 at 78-79) *See Moore v. Newport News Shipbuilding & Dry Dock Co.*, 7 BRBS 1024 (1978) (holding the employer must establish the claimant's earning capacity by at least establishing the pay scale for alternate jobs).

Employer argues that Claimant's position at the marina indicates that he is rehabilitated and that he successfully re-entered the workforce. (Tr. 22 at 25, Post-Hearing Brief of Electric Boat Corp., at 3-5) Employer believes that Claimant still has an earning capacity and should only be entitled to partial disability. I disagree. The fact that Claimant worked for a period at the marina does not prevent him from recovering total disability compensation. *See Carter v. General Elevator Co.*, 14 BRBS 90 (1981) (holding Claimant's obtaining a short-term job post-injury did not establish that he was not totally disabled, unless the employer could show the job was still available); *Seals v. Ingalls Shipbuilding, Div. of Litton Sys.*, 8 BRBS 182 (1978) (concluding sporadic post-injury work does not rule out permanent total disability).

Employer relies on a report written by Kathy Dzeikan and the deposition testimony of Kirsten Dillingham, who testified that when an injured person remains employed for 60 continuous days post-injury, he is considered to have re-entered the workforce.<sup>9</sup> (EX 9 at 44, EX 14 at 22) However, Mr. Murgo pointed out that the Claimant's position was accommodated and, despite this help, he was still unable to function at the end of his four-hour shift. (CX 22 at 59-61) Mr. Murgo also felt that even if Claimant's job at the marina was permanent, he would only have been able to hold the position a short while longer, as his pain level increased and his treatment options ran out. (CX 22 at 62)

I find that Mr. Murgo's opinions are persuasive. Mr. Murgo considered the characteristics of the marina job, and how it accommodated the Claimant, as well as the effect that this work had on the Claimant's condition. But Ms. Dillingham and Ms. Dzeikan relied on the fact of the Claimant's employment at the marina without acknowledging the accommodations made for him. In addition, the Claimant's immobility after his accommodated four-hour shift strongly suggests this was an unsuccessful attempt to re-enter the workforce.<sup>10</sup> *See Eastern S.S. Lines v. Monahan*, 110 F.2d 840, 841 (1<sup>st</sup> Cir. 1940) (There is no actual inconsistency between a man being totally disabled for the purposes of the Longshoremen's and Harbor Workers' Compensation Act, and possessing a present ability to do work of a very limited nature.); *Haughton Elevator Service Co. v. Lewis*, 572 F.2d 447 (4<sup>th</sup> Cir. 1978). I note that Ms.

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<sup>9</sup> While a period of sixty days of continuous employment may be an industry standard for vocational purposes, it is not binding or presumptive with respect to this Court's determination.

<sup>10</sup> The Claimant testified that after his four hour shift, the pain caused by the aggravation of his back condition made him unable to function for the rest of the day. (Tr. 61, CX 5 at 2, CX 8 at 1).

Dillingham was unwilling to state that Claimant had the ability to maintain a job. (EX 14 at 37) I therefore find that the Claimant's limited period of work at the marina did not constitute a re-entry into the workforce.

Even setting aside the concept of whether the Claimant has successfully re-entered the workplace, the law places the burden of finding suitable alternative employment on the employer, and the employer must prove that such work is reasonably and regularly available. *Edwards v. Director, OWCP*, 999 F.2d 1374 (9<sup>th</sup> Cir. 1993), 27 BRBS 81 (CRT), *cert den'd* 511 U.S. 1031 (1994), *Carter*, 14 BRBS at 97. Here, Claimant's marina position was short-term. He was hired to fix a backlog of broken motors, and his job ended when he worked his way through the backlog. Claimant's Brief, at 13. Employer's contention that there are other marinas in the area is meaningless without proving that those marinas are able to provide regular and reasonable employment to Claimant. Post-Hearing Brief of Electric Boat Corp., at 4. It is Employer's burden to provide other positions that fit within Claimant's physical and vocational qualifications. I find Employer has not satisfied this burden.

Thus, I find Employer has failed to provide suitable alternative employment for Claimant. Accordingly, I conclude that Claimant is permanently and totally disabled, and therefore find he has no wage earning capacity. *See Korineck v. General Dynamics Corp. Elec. Boat Div.*, 835 F.2d 42, 43, 20 BRBS 63, 64 (CRT) (2d Cir. 1987) (holding that where suitable alternative employment is not established and an award of permanent disability is made, a permanent loss of all wage-earning capacity is presupposed.)

#### Claimant's Diligence and Willingness to Work

Assuming, *arguendo*, Employer did establish suitable alternative employment, the burden would shift back to the Claimant to establish that he attempted to secure suitable alternate employment opportunities with reasonable diligence. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991); *Trans-State Dredging v. Benefits Review Bd. (Tarney)*, 731 F.2d 199, 202, 16 BRBS 74, 76 (CRT) (4<sup>th</sup> Cir. 1984), *rev'g* 13 BRBS 53 (1980); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 542 (4<sup>th</sup> Cir. 1988). In other words, the claimant must have been genuinely seeking work while demonstrating a willingness to work.<sup>11</sup> *See id.*; *Turner*, 661 F.2d at 1043. If the claimant cannot satisfy this burden, then at the most, his disability is partial and not total. *See* 33 U.S.C. §908(c); *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985). I find Claimant did attempt to secure suitable alternate employment with reasonable diligence.

It is clear from the record that Claimant used reasonable diligence in attempting to obtain employment. Claimant has provided pages of jobs for which he applied. (See CX

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<sup>11</sup> While there is no minimum number of applications that must be submitted or inquiries that must be made in order for the claimant to meet his burden, and while the claimant is not required to show that he tried to get the identical jobs the employer showed were available, the claimant is required to establish that he was reasonably diligent in attempting to secure a job "within the compass of employment opportunities shown by the employer to be reasonably attainable and available." *Turner*, 661 F.2d at 1043; *see Palombo*, 937 F.2d at 70.

16 at 18) Many of these positions were recommended by Employer as suitable alternate employment, albeit for different employers.<sup>12</sup> Claimant also applied for positions not recommended by Employer, such as a painter (CX 15 at 73), carpenter (CX 15 at 138), data collector (CX 16 at 34), mail clerk (CX 16 at 43), and Home Depot clerk. (CX 16 at 49) When Claimant was rejected from Wal-Mart due to his disability, he wrote a letter to the corporation asking for another position, only to be offered another position that he was physically unable to perform. (Tr. 68 at 70) Indeed, even Ms. Dillingham admitted Claimant made a good faith effort to find employment. (EX 14 at 47) Claimant appears to have applied for every job possible, and it is clear he used reasonable diligence to secure employment.

As noted earlier, I had the opportunity to observe the Claimant's demeanor and to assess his credibility at the hearing. I found him to be a thoroughly credible witness. It is clear from his testimony, as well as the medical records, that he suffers from constant, unrelenting pain. He continued to work for the Employer until his condition no longer allowed him to, and he has explored every avenue for the possible alleviation of his chronic pain. Despite his condition, he has made a good faith attempt to find suitable employment, and indeed was able to work for a limited time, despite the fact that his four hour work day essentially "finished" him for the rest of the day. I find that the Claimant's chronic and debilitating pain, and his dependence on narcotic medications, standing alone, are sufficient to disqualify him from any reasonable chance at employment. Factoring in the Claimant's limited education and skills, I find that the Employer has not established that there is suitable alternative employment available for this Claimant.

I therefore conclude that Claimant established that he attempted to secure suitable alternate employment opportunities with reasonable diligence. *Trans-State Dredging*, 731 F.2d at 202. I find that the Claimant is permanently and totally disabled.

## **CONCLUSION**

Based on the foregoing, I find that Claimant has established that he is permanently and totally disabled due to his back injury, and that he is thus entitled to permanent total disability payments commencing July 26, 2000.

## **ORDER**

On the basis of the foregoing, the Claimant's request for disability compensation is granted.

Employer shall:

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<sup>12</sup> For example, Claimant applied for positions in sales (CX 15 at 83 and 92), assembly (CX 15 at 77 and 127, CX 16 at 26 and 36), security guarding (CX 15 at 83, CX 16 at 4), customer service (CX 15 at 83, CX 16 at 28), and inspecting. (CX 15 at 132)

- A. Pay to the Claimant temporary total disability compensation benefits from July 26, 2000 to January 12, 2004, based on an average weekly wage of \$879.59.
- B. Pay to the Claimant permanent total disability compensation benefits from January 13, 2004 to May 16, 2004, based on an average weekly wage of \$879.59.
- C. Pay to the Claimant permanent partial disability compensation benefits from May 17, 2004 to September 20, 2004, at the rate of \$469.73 per week.
- D. Pay to the Claimant permanent total disability compensation benefits from September 21, 2004 and continuing, based on an average weekly wage of \$879.59.
- E. Receive credit for all amounts previously paid to Claimant as a result of his injuries of July 26, 2000.
- F. Pay to the Claimant all medical benefits to which he is entitled under the Longshore and Harbor Workers' Compensation Act.
- G. Pay to the Claimant's attorney fees and costs to be established by a supplemental order.
- H. The District Director shall perform all calculations necessary to effect this Order.

**SO ORDERED.**

**A**

LINDA S. CHAPMAN  
Administrative Law Judge